ORIGINAL DOCKET FILE COPY ORIGINAL

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

RECEIVED
OCT - 9 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

| | | |
|---|---|---|
| Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934 | ) ) ) ) ) | WT Docket No. ~~97-197~~ 97-192 |

**COMMENTS OF CONCERNED COMMUNITIES AND ORGANIZATIONS CONSISTING OF:**

AZ: Town of Paradise Valley

CO: City and County of Denver, City of Lakewood

DC: National Association of Counties

FL: City of Coconut Creek, City of Fort Lauderdale

IL: City of Breese, City of Naperville, City of Rockford, City of St. Charles, Village of Western Springs

MI: City of Grand Rapids, City of Detroit and 24 other Michigan municipalities

MO: City of Gladstone, City of Springfield

NC: Piedmont Triad Council of Governments consisting of 24 North Carolina local governments and Town of Chapel Hill

NJ: Bridgewater Township

NV: City of Las Vegas

OH: City of Canton, City of Eastlake

TX: City of Dallas, City of Grand Prairie, and 20 other Texas municipalities

UT: City of Provo

John W. Pestle
Patrick A. Miles, Jr.
Mark E. Nettleton
VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
333 Bridge Street, N.W.
Grand Rapids, MI 49504
Their Attorneys

October 8, 1997

No. of Copies rec'd 0+9
List ABCDE

TABLE OF CONTENTS

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

In the Matter of

| | | |
|---|---|---|
| Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934 | ) ) ) ) ) | WT Docket No. 97-197 |

## COMMENTS OF CONCERNED COMMUNITIES AND ORGANIZATIONS

## I. INTRODUCTION AND SUMMARY

Pursuant to the Notice of Proposed Rulemaking in the above-captioned proceeding, FCC 97-303 (released August 25, 1997) ("NPR"), the Concerned Communities and Organizations ("CCO"), by their attorneys, hereby respectfully file their comments.[1] CCO

---

[1]The Concerned Communities consist of the following local governments and organizations:

| | |
|---|---|
| **Arizona:** | Town of Paradise Valley |
| **Colorado**: | City and County of Denver, City of Lakewood |
| **Florida:** | City of Coconut Creek, City of Fort Lauderdale |
| **Illinois**: | City of Breese, City of Naperville, City of Rockford, City of St. Charles, Village of Western Springs |
| **Michigan**: | City of Detroit, City of Grand Rapids, Ada Township, Bloomfield Township, Byron Township, Canton Charter Township, City of Birmingham, City of Cadillac, City of Eaton Rapids, City of Huntington, City of Kentwood, City of Livonia, City of Marquette, City of Rockford, City of Walker, City of Wyoming, Elk Rapids Township, Frenchtown Charter Township, Gaines Charter Township, Grand Haven Charter Township, Grand Rapids Charter Township Harrison Charter Township Robinson Township, Scio Township, City of Westland, Zeeland Charter Township |
| **Missouri:** | City of Gladstone, City of Springfield |
| **New Jersey:** | Bridgewater Township |

respectfully submit that the Commission should refrain from adopting rules which improperly infringe on powers and authority delegated by the 10th Amendment to the U.S. Constitution to State and local governments. Specifically, CCO question whether Section 332(c)(7)(B)(iv) of the Communications Act of 1934, as amended, allows the Commission to reverse or preempt local zoning decisions solely because concerns over radio frequency (RF) emissions were raised in the local proceedings. Such actions by the Commission would violate the principle of federalism, and the First Amendment to the U.S. Constitution. CCO also respectfully suggest that the Commission establish a standard of review consistent with the deference typically given to local legislative bodies.

CCO respectfully disagree with the Commission's attempt to determine the average length of time local governments take to issue various types of permits. Such a

---

| | |
|---|---|
| **Nevada:** | City of Las Vegas |
| **North Carolina:** | Piedmont Triad Council of Governments consisting of Alamance County, City of Archdale, City of Asheboro, City of Burlington, Caswell County, Town of Chapel Hill, Davidson County, City of Eden, Town of Elon College, Town of Gibsonville, City of Graham, Guilford County, Town of Haw River, City of High Point, Town of Jamestown, City of Lexington, Town of Liberty, Town of Madison, Town of Mayodan, City of Mebane, City of Randleman, Randolph County, Town of Ramseur, City of Reidsville, Rockingham County, and Town of Yanceyville |
| **Ohio**: | City of Canton, City of Eastlake |
| **Texas**: | City of Dallas, City of Grand Prairie, City of Amarillo, City of Arlington, City of Cedar Hill, City of Coppell, City of Crowley, City of DeSoto, City of Fort Worth, City of Haltom City, City of Hurst, City of Irving, City of Kaufman, City of Keller, City of Kennedale, City of Lancaster, City of Laredo, City of Longview, City of Plano, City of University Park, City of Waxahachie, Town of Addison |
| **Utah:** | City of Provo |

The National Association of Counties is the only national organization representing county government in the United States.

determination is contrary to the Congressional directive which demands case-by-case determinations.

CCO believe that the Commission should define "final action" for purposes of Section 332 of the Communications Act to mean action that is otherwise directly appealable to a local court by a wireless provider.

CCO respectfully submit that the Commission's attempt to remove local authority to monitor radiation from cellular towers is inappropriate. The Commission, as well as State and local governments, are charged with protecting the public health, safety and welfare. Advocacy for an industry should not cause the Commission to unduly restrict enforcement of the emission limits set by the Commission. CMRS Licensing exemptions differ from operational RF emissions measurements and local governments need the ability to monitor and measure compliance.

Moreover, CCO respectfully notes that the Commission has no statutory basis to presume provider compliance with its RF emission guidelines.

Homeowner associations and other private entities clearly do not constitute State or local government instrumentalities. Further, actions by such private corporations and associations do not constitute State action. CCO respectfully submit any other constriction would exceed the Commission's statutory authority.

## II. THE COMMISSION IS NOT AUTHORIZED TO PREEMPT STATE AND LOCAL REGULATIONS WHICH REFERENCE ENVIRONMENTAL EFFECTS OF RF EMISSIONS IN THE RECORD

CCO respectfully caution the Commission not to reach beyond the statutory language of Section 332(c)(7)(B)(iv). Specifically, the Commission should not develop rules or precedent which precludes any mention of radio frequency emissions at the local government level. The plain language of Section 332(c)(7)(B)(iv) states as follows:

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions. 47 U.S.C. § 332(c)(7)(B)(iv).

The Commission is authorized to hear petitions and grant relief to "any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv)." 47 U.S.C. § 332(c)(7)(B)(v).

The NPR notes that "the Conference Report stated that, in order to be reviewed pursuant to Section 337(c)(7)(B)(v) of the Communications Act, such regulations may be based either **directly or indirectly** on the environmental effects of RF emissions. NPR, at ¶ 139 [emphasis in original]. The NPR goes on, however, to conclude that "State and local regulations do not have to be based entirely on the environmental effects of RF emissions in order for decisions to be reviewed by the Commission." See NPR, at ¶ 139. CCO respectfully disagree with such conclusion for the reasons set forth below.

First, CCO respectfully submit that the Commission is inappropriately replacing the Conference Report's phrase "directly or indirectly" with its own terms "entirely or partially."

Had Congress intended to allow Commission preemption of State and local actions or failures to act which are based partially on the environmental effects of RF emissions, Congress would have said so. That is, the basis of a decision is found in its logic and conclusions. If such decision -- as reflected in the decision itself -- shows on its face that concern over RF emissions were the source or foundation of the act or failure to act, then the Commission may have a role.

But, the Commission can not look beyond a State or local government's stated basis for acting or failing to act in connection with the placement, construction, and modification of personal wireless service facilities. The Commission is not authorized to determine or speculate whether any "taint" appears in the record concerning environmental effects of radio frequency emissions. The basis of State or local government action or inaction is in the stated reasons for the action, not in any alleged ulterior motives.

Second, the Commission's powers to review State and local governments' decisions (i.e., acts or failures to act) can not exceed judicial powers. And, courts generally are prohibited from examining the motives of local legislative bodies on review. Davidson County v. Rogers, 184 Tenn. 327, 333; 198 S.W. 2d 812, 815 (S.Ct. 1947) ["It is clear that

the scope of judicial review is very limited. . . the Court, of course, can not indulge in speculation or suspicion, but must determine the question on the evidence as it is presented in this record."].

Courts generally must give substantial deference to local government decision-making bodies. The Commission must do the same. Therefore, the Commission cannot speculate, at a wireless provider's request, as to the "true" basis for a local act or failure to act. The stated reason suffices.

Indeed, "courts will not sit in review of proceedings of municipal officers and departments involving legislative discretion, except, as subsequently noted, in cases of fraud, corruption, or arbitrary, unreasonable actions amounting to abuse of discretion." McQuillan, Municipal Corporations, § 10.33, at 408. Section 332(c)(7) does not authorize the Commission to undertake such a review. In this regard, the Commission should note the following:

> The general rule is that courts will not inquire into the motives that prompted the exercise of a discretionary power of a municipal legislative body. So, generally the motives of the municipal authorities are exempt from judicial inquiry in the absence of fraud, corruption or oppression, even when the municipality is acting in its proprietary capacity. Hence, the courts will not take into account the motives that induced any particular action, nor the way in which the power was exercised. McQuillan, Municipal Corporations, § 10.35, at 416.

Thus, courts -- and by implication this Commission -- are precluded from examining the "motives" of local legislative bodies in exercising their discretionary powers. Similarly,

examination beyond the stated basis of a local legislative act or failure to act is outside of the Commission's authority. This principle is stated succinctly as follows:

> Parol evidence as to the motives of legislators or officers, protected by the rule of judicial refusal to inquire into their motives, is not admissible. Furthermore, the courts recognize, in the absence of evidence to the contrary, a presumption of good faith in the enactment of municipal legislation. McQuillan, Municipal Corporations, § 16.90, at 400.

In sum, the term "indirect" in the Conference Report does not mean partial. By the plain language of the Act, the term "basis" means the foundation for the local legislative decision. The Conference Report's use of the phrase "directly or indirectly" merely amplifies that the main thrust of an act or failure to act cannot be justified directly or indirectly by concerns over RF emissions, to the extent the relevant facilities comply with the Commission's regulations. See 47 U.S.C. § 332 (c)(7)(B)(iv). The Commission cannot construe the Act to give it powers courts lack.

Moreover, it is inappropriate for the Commission to infer that Congress would not allow any discussion of environmental effects of RF emissions in connection with State or local actions. The Commission can not construe the Congressional directive to result in a violation of the First Amendment to the U.S. Constitution. That is, the provisions of Section 332(c)(7)(B)(iv) do not and cannot prohibit the public or local officials from expressing concerns about the environmental effects of RF emissions.

The Commission is not entitled to look behind the stated basis for a local government's action or failure to act, and peruse the record to find any mention of environmental effects in order to cancel local action. Such power would have a chilling effect on free speech in local public meetings. This Commission should be aware -- as it apparently is not -- that for many municipalities, State or local law requires that each council meeting, planning commission meeting and the like have a "public comment period". An essential element of these public comment periods typically is that citizens may speak on any item they wish (whether on the agenda for action or not) subject only to reasonable time limits.[2]

Stated otherwise, such public comment periods may be "public forums" under a First Amendment analysis, such that any attempt by this Commission to effectively restrict speech during such sessions (by allowing wireless providers to contend that based on remarks made during such sessions that local zoning decisions can be overturned) may violate the First Amendment by chilling speech. Indeed, any such attempt would be impermissibly "void for vagueness" and would violate the First Amendment and because the Commission would be regulating the content of speech. For example, the Commission would impermissibly be asked to distinguish (1) public statements which are clearly permissible (e.g., "municipalities should support legislation under consideration by Representative Robert Wexler (D-FL) to

---

[2]CCO brings this public comment period to the attention of this Commission because although a common part of local government, these "public comment periods" or "public forums" appear to be foreign to and not recognized by this Commission.

give municipalities regulatory authority over RF radiation from cellular towers located near schools or requests that communities regulate RF emissions which exceed this Commission's regulations") from (2) other comments which wireless providers or the Commission would contend are impermissible.

Obviously, concerned citizens may express reservations or sentiments regarding environmental effects of RF emissions in such public forums. Public officials may do the same. Under the Commission's view of its authority, even if the local legislative body has legitimate bases for its action or failure to act, the mere mention in a public comment period of environmental effects could result in FCC preemption.

Any Commission ruling precluding such public comment may violate the First Amendment, and certainly has a chilling effect on freedom of expression. In this regard, the Supreme Court recently stated:

> "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. See Leathers v. Medlock, 499 U.S. 439, 449; 111 S.Ct. 438, 1444-1445 [citing Cohen v. California, 403 U.S. 15, 24; 91 S.Ct. 1780, 1787-1788; 29 L.Ed.2d 284 (1971)]; West Virginia Board of Education v. Barnette, 319 U.S. 624, 638, 640-642; 63 S.Ct. 1178, 1185, 1186-1187; 87 L.Ed.2d 1628 (1943). Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion

> rather than persuasion. These restrictions 'rais[e] the specter that Government may effectively drive certain ideas or viewpoints from the marketplace.' Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105; 112 S.Ct. 501, 508; 116 L.Ed.2d 476 (1991)." Turner Broadcasting System, Inc. v. F.C.C., ___ U.S. ___, 114 S.Ct. 2445, 2458, ___ L.Ed.2d ___ (1994)

Thus, concerned and interested citizens are typically given the opportunity to make remarks about pending local action, as are local officials. Such comments, even if they relate to RF emissions or environmental effects, are permissible and cannot be restricted or stopped. The Commission should not and cannot attempt to stifle health, safety, and welfare concerns so long as State and local governments comply with the applicable statutory provisions. That is, State and local governments may take into consideration, or at minimum hear comments about, RF emission concerns, but may not solely base a decision on such effects. See 47 U.S.C. § 332(a)(7)(B)(iv).

Moreover, Commission intrusion into the deliberative process of local governments violates the 10th Amendment to the U.S. Constitution and the principle of federalism. Justice O'Connor expressed this sentiment while dissenting in Federal Energy Regulatory Commission v. Mississippi, as follows: "State legislative and administrative bodies are not field offices of the national bureaucracy. . . each state is sovereign within its own domain. . . and the Constitution contemplates an indestructible Union, composed of indestructible States." Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 777; 102 S.Ct. 2126, 2147; 72 L. Ed. 2d 532 (1982). A law article noted that recent Supreme Court

decisions culminating in Printz v. U.S., _____ U.S. _____; 117 S.Ct. 2365; _____ L.Ed.2d _____ (1997) [Brady Handgun Violence Prevention Act], "contend that conscripting the States into federal regulatory programs (1) 'drains the inventive energy of State governmental bodies,' (2) 'blurs the lines of political accountability,' (3) lessens the ability of the States to serve as 'laboratories for the development of new social, economic, and political ideas,' (4) 'limits the opportunity of all citizens to participate and represent government,' and (5) weakens 'a salutary check on national governmental power.'" Wilson, Conn. L. Trib., July 21, 1997.

The Commission is aware that local zoning and the regulation of land use is a function "traditionally performed by local government." Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30; 115 S.Ct. 395; 130 L.Ed. 2d 245 (1994). Hence, local government actions are not to be second-guessed by courts or this Commission. Further, challenges to such actions should rarely be successful.

CCO respectfully submit that the Commission cannot ignore the heavy burden a party challenging local zoning action bears. "It is well-established that, as an exercise of the police power, a zoning ordinance is presumed to be constitutionally valid. The party attacking the ordinance bears the heavy burden of showing that the ordinance is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. Clark v. Winnebago County, 817 F 2d. 407, 408 (7th Cir. 1987) [citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 596, 82 S.Ct. 987, 991, 8 L.Ed.2d 130 (1962); Village

of Euclid v. Ambler Realty Co., 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed 303 (1926); Albery v. Reddig, 718 F. 2d 245, 251 (7th Cir. 1983)]. In this regard, the Commission should note that, generally, the scope of inquiry and the admissible evidence in a proceeding for relief against a zoning ordinance as invalid "is limited to whether the council had authority to pass the ordinance, whether it has a relationship to the public health, comfort, safety and welfare, and whether it is unreasonable or arbitrary in other respects." McQuillan, Municipal Corporations, § 25.294, at 554-555. Such standard is higher than that implied in the NPR.

The evidence the Commission needs to "support the conclusion that concerns over RF emissions constitute the basis for the regulation" must be more than supposition, speculation, or statements in the record. The Commission must defer to the local legislative body's determination and presume good faith on a part of the local legislative body. In contrast to the position in the NPR, the evidentiary standard needed to overturn the local action or failure to act is not the appropriate inquiry. Instead, the highly deferential "rational relationship" standard is the relevant standard on review. If the legislative act has "some rational basis" it must be upheld. And neither courts nor this Commission should make even an "extremely limited review of the evidence" as it would for review of administrative action. Pearson v. City of Grand Blanc, 961 F.2d 1211, 1222-1223 (6th Cir. 1992). The party challenging the rationale or basis of local legislation bears the burden of negating every conceivable basis for the act, regardless of whether or not such supporting rationale was cited

by, or actually relied upon by, the promulgating authority.

In reviewing the justifications for a legislative enactment, the court (and this Commission) may not "sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." Heller v. Doe, 509 U.S. 312; 113 S.Ct. 2637, 2642; 125 L. Ed.2d 257 (1993); see also Equal Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F. 3d. 261, 270 (6th Cir. 1995). As stated further by the Heller Court:

> Where there are 'pausable reasons' for [the legislative action], [the court's] inquiry is at an end. This standard of review is a paradigm of judicial restraint. 'The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we think a political branch has acted.' [Citations omitted]. In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or impartial data. 'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'" Id. at 2101-2102 [citations omitted].

## III. STATE AND LOCAL GOVERNMENTS MUST HAVE A ROLE IN MEASURING RF EMISSIONS

The Telecommunications Act of 1996 preserved and reaffirmed State and local governments' role regarding radio frequency radiation from cellular towers. In substance, this Commission sets limits for such radiation and State and local governments can regulate cellular towers if emissions exceed the levels prescribed by the Commission.

This division of responsibility makes sense. Congress was clearly aware, as was this Commission, that prior to 1996 many citizens were raising concerns about the radiation from cellular antennas. Congress wisely recognized in Section 332(c)(7)(B)(iv) that it is desirable for this Commission to set national standards for such emissions.

But Congress also apparently recognized that local units of governments, in the zoning process, have to be able to answer the question of whether emissions in fact will comply with applicable regulations. Congress thus restricted State and local governments' powers only "to the extent" that cellular facilities "comply with the Commission's regulations concerning such emissions." 47 U.S.C. 332(c)(7)(B)(iv).

The fact that the Commission may believe that certain cellular facilities are less likely to violate its emission rules and thus are "categorically exempt" from actual field measurements of radiation in connection with the Commission's cellular licensing process has no bearing on the statutory preservation of State and local government jurisdiction. To repeat, the statute states that such jurisdiction relates to whether the providers' "emissions" actually comply with the Commission's radiation guidelines. The fact that for administrative ease, expediency or other reasons the Commission does not require actual measurements as a part of its cellular licensing process is a completely separate and unrelated matter.

Congress's decision to base local jurisdiction on whether the emissions do or do not comply with the Commission's rules makes obvious sense. To put it most simply, "the proof of the pudding is in the eating." Many things can go wrong in the licensing, installation and

operation of cellular facilities that could lead to a facility not complying with this Commission's radiation guidelines. These range from errors in design calculations to the installation of the wrong equipment, improper setup and calibration, damage or alteration to the antenna array and placement of other equipment, structures or transmission facilities nearby. The NPR recognizes several of these factors as relevant. NPR, at ¶ 146.

The preceding factors are accentuated not only Murphy's law ("whatever can go wrong will go wrong") but by the financial state of at least some of the current or proposed cellular providers. This is best illustrated by the actual bankruptcy of Pocket Communications and lingering concerns about the viability of other providers. This Commission should not need to be reminded that a cellular provider in financial straits has little to lose by altering its cellular antennas and transmission equipment to provide better coverage, obviate the need for another (expensive) tower, forgo planned maintenance or take other actions to the same effect.

And the sad truth remains that some providers will knowingly disobey the Commission's regulations. A particularly blatant example of this involved Centel Cellular Company upon whom this Commission levied a $2 million fine (reduced from $3 million initially) for constructing a cellular tower in an airport landing path without notifying the FAA and without appropriate lighting. As the Commission said in its order reaffirming its action against Centel but reducing the fine to $2 million:

> We issued a *Notice of Apparent Liability for Forfeiture* ("NALF") in the amount of $3,000,000 against Centel Cellular Company of North Carolina Limited Partnership ("Centel") for having violated our rules that safeguard public safety. Specifically, Centel endangered public safety by constructing and placing in operation an antenna tower that constituted a hazard to air navigation because the tower penetrated the air safety zone directly in line with the aircraft departure and approach path at Greensboro/Piedmont Triad International Airport in North Carolina. This impermissible invasion of airspace occurred because Centel failed to comply with our rules that required it to notify the Federal Aviation Administration ("FAA") and to obtain the FAA's approval before constructing the tower. Centel also failed to comply with our tower safety lighting rules. Finally, Centel failed to act promptly to lower and light the tower even after its staff, in responding to a Commission query, corrected the calculation errors and therefore knew that the tower impermissibly intruded into the airspace. Centel also did not act promptly even later, when the FAA directly informed Centel that the tower was a threat to air safety, requested that Centel immediately take remedial action, and issued an air safety hazard warning to pilots and navigators. In re Centel Cellular Company of North Carolina Limited Partnership, FCC 96-346, at ¶ 1 (Aug. 12, 1996) (footnotes omitted).

If a well established cellular provider like Centel is willing to blatantly violate Commission rules in many respects on items which are obvious and easy to discover (the fact that a tower is in existence, is not on navigation charts, and is not registered with the FAA) it should be apparent to this Commission that other cellular providers may be willing to violate the Commission's radiation emission rules where it is difficult for the ordinary citizen or local unit of government to measure, monitor or detect the violation.

Congress was aware that this Commission has continuously reduced its field staff such that it rarely, if ever, conducts actual measurements of the radiation from cellular towers. This appears to be particularly true for what may be the most prevalent type of tower, the type the Commission calls "categorically exempt" which, in general, appears to be the standard single antenna tower.

Finally, it is disturbing (presumably to Congress as well) that the Commission sometimes appears to place the welfare of the industry it regulates ahead of the safety and welfare of citizens. In this regard the Commission's statement in the NPR that it wishes to develop criteria for demonstrating compliance with its emission guidelines "that would impose a minimal burden on service providers, while satisfying the legitimate State and local government interests" is of significant note and concern. NPR, at ¶ 144. This is because the Commission appears to place first priority on "minimizing the burden on service providers" whereas the first priority always must be on safety, that is, making sure that the emission guidelines established by this Commission as the safe limit for radiation for cellular towers have not been exceeded.

The preceding are the policy reasons why Congress wisely chose to maintain authority with State and local governments to require cellular providers to demonstrate compliance with the Commission's emission guidelines. They also indicate why State and local governments may require cellular providers to conduct actual field measurements on a periodic basis to show such compliance. This is definitely the best means of showing

compliance. It is also the best means, typically, of allaying citizen concerns about cellular towers.

CCO are aware that the Commission, as a general matter, is attempting to encourage the rapid provision of cellular service throughout the U.S. The Commission should be aware that Congress, by retaining local authority to require cellular providers to conduct actual measurements of the radiation from their tower, gave local governments a useful means to alleviate citizen concern over radiation. In general, it is quite effective for a local government to be able to tell its residents that in appropriate situations the municipality will require the cellular provider to conduct periodic measurements of the emissions from a tower so that people in the vicinity can be assured that the facility complies with FCC radiation rules.

By contrast, it is a red flag for citizens if (as the NPR suggests) local governments effectively have to tell their citizens that there are FCC limits on the radiation from cellular towers but that the FCC prohibits local governments from requiring the cellular provider to make measurements to show that it is in compliance. Such statements, for obvious reasons, simply heighten citizen concerns and encourage opposition to cellular towers by raising concerns of "What are they trying to hide?" or "If they are in compliance with the FCC rules why are they objecting to measurements to prove it?"

The Commission appears to place some reliance for its legal position that local government required measurements of RF radiation could either impermissibly regulate entry

under Section 332 or constitute a barrier to entry under Section 253 of the Act. Such contentions are incorrect as the Congressional language in Section 332(c)(7)(B)(iv) expressly overrides and modifies other provisions of Section 332. Section 332(c)(7)(A) preserves local powers expressly by stating that "nothing in this Act" shall limit the powers granted by the Section. 47 U.S.C. § 332(c)(7)(A). For this reason alone other sections of Section 332 and Section 253 do not apply.

Assuming arguendo, however, that the Commission does have some authority under Section 332 to address measurements required at the local level which do "regulate entry" (which CCO do not concede), at most, this Commission can specify that a certain measurement regime is acceptable and does not regulate entry. Again, Section 253 is inapplicable here, in part because the Commission can only proceed case-by-case and this is not such a case-by-case proceeding.

The Commission's Local and State Government Advisory Committee ("LSGAC") in its recommendation number 5 stated in part that the Commission should work with State and local governments and industry "to establish a mutually acceptable RF testing and documentation mechanism" that (1) -- "providers *may* use to demonstrate compliance with the RF radiation guidelines" and (2) -- "State and local governments *may* accept as demonstrating compliance with such guidelines." Advisory Recommendation Number 5: PCIA Letter Concerning Radio Frequency Emissions, FCC Local and State Government Advisory Committee (June 27, 1997) [italics in original]. CCO believe this recommendation

is a sound one with the caveats (see the two words italicized in the original) set forth therein.

In this regard, CCO believe that the "uniform demonstration of compliance" procedure outlined by the Commission in its NPR at paragraph 146 could be useful with the following change: Item (2) of the uniform demonstration of compliance should have the first three sentences deleted and replaced with the following:

> A statement as to the actual field measurements made by the personal wireless service provider, including the procedures and protocols for calibrating the measurement device and for conducting the measurements.

This change, in substance, insures that compliance under this testing procedure is shown by actual measurements and not by calculations. The reasons for such change are those set forth above.

The Commission also sought comment on which party should bear the cost for demonstrating compliance, i.e. for field measurements or the like. NPR, ¶ 144. The short answer to this is that the burden and cost is on the provider in all instances.

As is set forth above, Congress has preserved local jurisdiction regarding emissions from cellular towers which may exceed Commission guidelines. In the application for a permit before a government agency (State, Federal, local) it is the applicant that bears the responsibility of taking all steps necessary to obtain the permit, including steps to show compliance with applicable law.

The situation here is no different. As a matter of policy, as well as a legal matter under Section 332(c)(7)(B)(iv), providers should and must bear the cost of the measurements set forth above.

## IV. THE COMMISSION CANNOT DETERMINE THE AVERAGE LENGTH OF TIME FOR LOCAL ACTION AND COMPLY WITH THE CONGRESSIONAL MANDATE TO ACT ON A CASE-BY-CASE BASIS

The Commission states that for its proposed rule it needs to determine whether a State or local government has failed to act "on a case by case basis". NPR, at ¶ 138. The Commission goes on to state that this will include "taking into account various factors, including how State and local governments typically process other facility siting requests and other RF-related actions by these governments." NPR, at ¶ 138. The Commission correctly bases these statements on the Conference Committee Report on Section 332(c)(7)(B)(v) which sets forth three key points:

-- The time period for rendering a zoning decision on a personal wireless facility is "the usual period under such circumstances." Committee Report, at 208.

-- It is not the intent of Congress "to give preferential treatment" to the wireless industry in processing of requests. Id.

-- It is the intent of Congress that "the generally applicable timeframes" for zoning decisions by local governments are what apply to zoning requests for personal wireless facilities. Id.

However, the Commission's request for comments "on the average length of time" it takes to issue various types of "siting permits, such as building permits, special or conditional use permits" and the like, NPR at ¶ 138, violates the preceding directive from Congress.

Specifically, the Congressional directive can only be complied with if the "generally applicable timeframe" is computed (1) -- for the specific local unit of government in question whose action or inaction is being challenged, (2) -- for the particular type of permission being sought, and (3) -- for permissions of the same nature as the permission being sought. The Commission's request for "average lengths of time" violates the statute by granting preferential treatment and not addressing the "usual period of time under such circumstances", that is, for the specific municipality and type and nature of permission in question.

On the first point, the Congressional directive described above can only be complied with if the time period is computed municipality by municipality. Any "average" computed based on the timeframes for multiple local governments is impermissible because, of necessity, it would be applying to the local government in question time frames from other local governments with "different circumstances", not the same circumstances as directed by Congress.

By way of example, the timeframes for decision can vary substantially from municipality to municipality due to factors such as:

-- The complexity of the local zoning process, which often is a direct function of the size of the community in question. Large cities, such as Los Angeles, Chicago or New York, have zoning ordinances that run into the hundreds of pages. Small communities may have a zoning ordinance 15 pages long.

-- The procedures mandated by the municipal ordinance in question, including the amount and nature of administrative processing and review, which will be substantially different for large communities than for small ones.

-- Whether and to what extent additional information is requested by the municipality and the procedures and timeframes applicable for such requests. This Commission should be aware that this often is a significant factor as planning commissions' staffs often must obtain additional information from the applicant and others to see whether and how best to modify a request such that it can be accommodated within the parameters of an existing zoning ordinance.

-- Actual or effective requirements for meetings with administrative staff.

-- Formal hearing requirements and notice requirements for same, which again can vary substantially from community to community. For example, a rezoning or variance request typically will involve the notification of all landowners within a certain distance (e.g., several hundred feet) of the parcel in question. Communities vary substantially as to (a) whether notice has to be given to nearby landowners, (b) how many landowners have to be notified (which has a direct bearing as to how much time it takes administratively to go through the city's land records to identify the parcels in question, identify their owners and then mail out the notice), and (c) the number of days or weeks notice which a landowner must receive prior to the hearing as well as (d) how frequently hearings occur (weekly, monthly, quarterly or the like).

For all these reasons the time period for measuring action has to be computed municipality by municipality. The use of data from other local governments to determine whether a given local government has acted or failed to act violates the statute and Congressional intent as indicated above.